IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Theresa Collins, Individually and as the Surviving Spouse and Personal Representative of the Estate of Bruce Collins,	)	
Plaintiff,	)	
v.	)	
	)	C.A. No. 06C-03-339-BEN
Ashland, Inc., Ashland Specialty Company, Benjamin Moore & Company, ICI Paints in North America, Inc., RPM International, Inc., The Sherwin Williams Company, WM Barr & Company, Inc., XIM Products, Inc., PPG Industries, Inc., and United States Steel Corporation	)	
Defendants.	)	

Date Submitted: April 25, 2008
Date Decided: January 6, 2009

Upon Defendant The Sherwin-Williams Company's Motion for Summary Judgment: **DENIED**

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Jurden, J.

I. INTRODUCTION

Before the Court is Defendant The Sherwin-Williams Company ("Sherwin-Williams") Motion for Summary Judgment on Product Identification. The lawsuit giving rise to this motion was filed on March 31, 2006 by Bruce and Theresa Collins. Regrettably, Mr. Collins passed away on July 10, 2006. His surviving spouse, Theresa Collins ("Plaintiff"), individually and on behalf of her husband's estate, claims that Mr. Collins contracted Acute Myelogenous Leukemia ("AML") as a proximate result of exposure to Benzene containing products manufactured by Sherwin-Williams. By its motion, Sherwin-Williams argues that there are no facts upon which Plaintiff can rely to establish that a product manufactured by Sherwin-Williams caused Mr. Collins' injuries.

II. BACKGROUND

A. Factual Background

Mr. Collins worked as a painter at Rosing Paints for nine months in 1984[1] and at Specialty Finishes LLC from 1984 to 2005.[2] Plaintiff claims that during this time period, Mr. Collins was "exposed to, inhaled, ingested and/or otherwise absorbed benzene fumes emanating from benzene and benzene containing

[1] Sec. Am. Comp. at 6, ¶5(c), Docket Item ("D.I.") 64.
[2] *Id*. at 2, ¶4(a).

products" that were manufactured by Sherwin-Williams.[3] Plaintiff lists in her complaint twenty-nine specific Sherwin-Williams products to which Plaintiff was allegedly exposed.[4] Before his death, Mr. Collins submitted an affidavit (the "Collins Affidavit") describing his alleged exposure to Sherwin-Williams products, however neither party deposed Mr. Collins prior to his passing.[5]

Plaintiff submitted affidavits from two alleged former co-workers of Mr. Collins – Robert Dyar and Jerry Hood.[6] The Hood and Dyar Affidavits describe the context of Mr. Collins' alleged exposure to Sherwin-Williams products, and specifically list a number of its products.[7]

B. Procedural Background

Pursuant to the Order issued by the Hon. Joseph R. Slights, III on September 28, 2007, the parties were to complete all fact discovery on product identification and causation by February 29, 2008 (the "Discovery Cutoff"). The Discovery Cutoff passed without Plaintiff taking any depositions or propounding any third party discovery. After the Discovery Cutoff had passed, Plaintiff moved to re-open discovery in order to take the depositions of three of Mr. Collins' co-workers:

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[3] *Id.* at 4.
[4] *Id.* at 8-9.
[5] Sherwin-Williams Br. in Sup. of its Mot. for Summ. J. ("Def. Brief") at 2.
[6] Pl.'s Mem. In Opp. to the Sherwin-Williams Company's Mot. for Summ. J. ("Pl. Answ. Br.") D.I. 279. It is this Court's understanding that all parties agreed to postpone deposing Mr. Dyar and Mr. Hood until after this Court's ruling. *See* Hr'g Tr. at 7:15-19, 11:20-22, Sept. 25, 2008 (Vavala, Com.), D.I. 353.
[7] *See e.g.* Hood Aff. at 2, D.I. 282. "[P]roducts including but not limited to Promar 200 Interior Semi-Gloss Enamel, Promar 400 Interior Alkyd Semi-Gloss Enamel, Sherwin Williams Flat Dry Fall, and Sherwin Williams Industrial Enamel, both at Rosing Paints and at Specialty Finishes."

Jerry Hood, Robert Dyar and Robert Stancil. Commissioner Mark S. Vavala held a hearing on Plaintiff's Motion to Re-open Discovery on March 20, 2008 and denied it on May 7, 2008.

Sherwin-Williams filed its Motion for Summary Judgment on Product Identification on April 25, 2008. In opposition to the Sherwin-Williams Motion, Plaintiff, for the first time, produced affidavits from co-workers Hood[8] and Dyar.[9] Plaintiff claims these affidavits "provide sufficient evidence of decedent's use of relevant Sherwin Williams products to overcome defendant's motion for summary judgment."[10] Sherwin-Williams argues that the Court should strike the Dyar and Hood Affidavits because, among other reasons, these affidavits impermissibly introduce new facts after the Discovery Cutoff and, coupled with Plaintiff's renewed request for additional discovery, constitute an impermissible fourth attempt to re-open discovery in this matter.[11] Sherwin-Williams further argues that if the Court allows the Hood and Dyar Affidavits,[12] Sherwin-Williams is still entitled to summary judgment because the Affidavits fail to create a genuine issue of material fact with regard to Sherwin-Williams. In opposition, Plaintiff argues

[8] Pl. Answ. Br., Ex. B. ("Hood Affidavit"), D.I. 282.
[9] Pl. Answ. Br., Ex. A. ("Dyar Affidavit"), D.I. 281.
[10] Pl. Answ. Br. at 3.
[11] *See* Sherwin-Williams Rep. Br. in Supp. of its Mot. for Summ. J. ("Reply Br.") at 2.
[12] The "Sham Affidavit" Doctrine is not at issue here.

that the Hood and Dyer Affidavits are properly before the Court and create genuine issues of material fact which preclude summary judgment.

III. STANDARD

On a motion for summary judgment, the Court examines "all facts in a light most favorable to the non-moving party, and determine[s] whether there is a genuine issue of material fact requiring a trial."[13] "When a motion for summary judgment is supported by evidence showing no material issues of fact, the burden shifts to the non-moving party to demonstrate that there are material issues of fact requiring trial."[14] "If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted."[15]

[13] *Urena v. Capano Homes, Inc.*, 901 A.2d 145, 150 (Del. Super. 2006), citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).
[14] *Id.; see also In re Asbestos Litig. ("Helm")*, 2007 WL 1651968, at *15 (Del. Super. June 25, 2007) (setting forth the standard of review on a motion for summary judgment).
[15] *In re Asbestos Litig. ("Hudson")*, 2007 WL 2410879 *2 (Del. Super. Aug. 27, 2007), citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

IV. DISCUSSION

A. Sufficiency of the Record

Affidavits may be submitted by a party opposing a motion for summary judgment for the purpose of creating a material issue of fact.[16] The affiant, however, must set forth facts admissible in evidence and be competent to testify to the matters stated herein.[17] At the time of the Discovery Cutoff, the only evidence of record to show that Mr. Collins was exposed to Sherwin-Williams products was the Collins Affidavit and the accompanying Interrogatory Responses. The Collins Affidavit is not admissible as a "dying declaration" under DRE 804(b)(2) because it was not made under the sense of impending death. The Collins Affidavit is not admissible under the narrowly construed "residual exception" found in DRE 807 because it lacks sufficient indicia of trustworthiness to fall within that exception.[18] The Affidavits and Interrogatory Responses constitute inadmissible hearsay,[19] and thus are insufficient to create a genuine issue of material fact as to product identification or exposure.[20]

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[16] Del. Super. Ct. Civ. R. 56(c) ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"); Sherwin-Williams Mot. for Summ. J. at ¶9, D.I. 249.

[17] R. 56(e).

[18] The Court previously ruled on this issue in *Collins v. Ashland, Inc.*, 2008 WL 3321848, *2-4 (Del. Super. Aug. 12, 2008).

[19] *See* Delaware Uniform Rule of Evidence ("DRE") 801; DRE 802.

[20] The Court will not consider inadmissible hearsay when deciding a motion for summary judgment. *Continental Cas. Co. v. Ocean Accident & Guar. Corp.*, 209 A.2d 743 (Del. 1965).

The Hood and Dyar Affidavits indicate that Mr. Hood and Mr. Dyar are willing and able to testify to Plaintiff's alleged exposure to Sherwin-Williams products. The level and frequency of such exposure is a material fact in the case. As discussed at greater length in *Collins v. Ashland, Inc.*,[21] this Court is reluctant to strike the entire Hood Affidavit as a sanction for Plaintiff's conduct during discovery.

Plaintiff should have identified Mr. Hood as a product identification/nexus witness against Sherwin-Williams in its discovery responses.[22] Although Mr. Hood was not identified as a product identification/nexus witness against Sherwin-Williams, he was identified early on in the litigation as a co-worker of Mr. Collins for the nine months that he and Mr. Hood worked together at Rosing Paints.[23] Defendants could have interviewed him or deposed him. In the interest of justice, despite Plaintiff's failure to properly respond to discovery and/or take third party discovery, the Court will consider the Hood Affidavit. However, Mr. Hood will only be permitted to testify about the nine-month period at Rosing Paints during which Mr. Collins was allegedly exposed to Sherwin-Williams products.[24]

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[21] *Collins*, 2008 WL 3321848 at *2-4.
[22] See *Stigliano*, 2006 WL 3492209 (Del. Super. Nov. 21, 2006) (stating that in order to put the defendant on sufficient notice, Plaintiff is required to identify and specifically designate as a "product nexus" witness any witness who will be utilized to establish product nexus).
[23] *Collins*, 2008 WL 3321848 at *3; Mot. Tr. at 10:11 to 14:15. July 7, 2008, D.I. 330.
[24] This is consistent with this Court's prior ruling striking a portion of the Hood Affidavit as it pertained to defendant Benjamin Moore. Hr'g Trans. Sept. 25, 2008 at 20:22 to 22:16 (Vavala, Com.); Order of Oct. 15, 2008

The Dyar Affidavit is stricken in its entirety. It will not be considered for purposes of this Court's product nexus analysis nor will Mr. Dyar be permitted to testify at trial. According to Mr. Dyar's Affidavit, he was an employee at Specialty Finishes from 1984 to 1999. Plaintiff did not identify Mr. Dyar as a product nexus witness prior to the Discovery Cutoff on February 29, 2008.[25] Plaintiff never mentioned his name in the course of litigation until a hearing on March 20, 2008.[26] Furthermore, the defendants completed depositions of other Special Finishes employees on February 27, 2008 in accordance with the guidelines set forth in this case.[27] Consequently, there is an insufficient basis to consider the Dyar Affidavit.

B. Product Nexus Analysis

In order to establish "product nexus," a plaintiff must establish that the defendant's product was present at the job site and that the plaintiff was in proximity to defendant's product at the time it was being used.[28] Delaware courts

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denying Pl.'s Mot. for Recons., D.I. 356; Hood Affidavit, *supra* note 8: "Prior to my employment at Specialty Finishes, I was employed at Rosing Paints for approximately nine months in 1984. . . I knew Bruce Collins as a fellow employee and worked with him on many occasions on numerous projects thought the course of my employment at Specialty Finishes and Rosing Paints."

[25] Mot. Tr. at 14:4-10, July 7, 2008.

[26] *Id*.

[27] *Id*. at 13:1-3.

[28] *Herring v. Ashland, Inc.*, 2008 WL 4335735, at *2 (Del. Super. Sept. 19, 2008); *Nutt v. A.C. & S., Inc.*, 517 A.2d 690, 692 (Del. Super. 1986).

also refer to this as the "time and place standard."[29] A plaintiff simply establishing that a defendant's product was present at plaintiff's work-site is not sufficient to establish product nexus.[30] It is the plaintiff's initial burden to establish "some evidence" of product nexus as to the time and place standard.[31] At the summary judgment stage, the non-moving plaintiff is entitled to all reasonable inferences in its favor; it is therefore the burden of the movant-defendant to negate support for such inferences.[32]

Defendant's reliance on *Lipscomb*[33] in attempting to refute the existence of product-nexus is misplaced. In *Lipscomb*, no direct evidence placed the plaintiff in proximity to the defendant's asbestos-covered pipes.[34] The record established that the plaintiff worked with the defendant's pipes; however, two types of pipe were used at the defendant's work-site, and only one of them contained asbestos. Without direct evidence at the summary judgment stage, the Court was willing to more closely scrutinize the facts in record to see if there was an inference to be made, circumstantially, that the plaintiff worked in proximity to both of the

[29] *See e.g. Lipscomb v. Champlain Cable Corp*., 1988 WL 102966, at *2-3 (Del. Super. Sept. 12, 1988); *In re Asbestos Litig.*, 509 A.2d 1116, 1117-18 (Del. Super. 1986).
[30] *Lee v. A.C. & S., Inc.* 1986 WL 15421, at *1 (Del. Super. Dec. 15, 1986).
[31] *Nutt*, 517 A.2d at 692.
[32] *See Id.* at 693. ("Absent evidence showing that during the May 1953 to October 1957 time period the DuPont Newport plant in fact bought asbestos cloth and tape from another manufacturer, the plaintiffs have enough to support the reasonable inference that at least during that time period the plaintiffs were exposed to . . . [defendant's] products."); *see also Conway v. A.C. & S. Co.*, 1987 WL 12448, at *1 (Del. Super. May 21, 1987). ("[Defendant], in its present motion, has not provided this Court with further evidence from which this Court could determine that the presence of . . . [Defendant's] product at Newport is not a material issue.")
[33] *Lipscomb*, 1988 WL 102966.
[34] *Id.* at *2-3.

asbestos pipes.[35] Had the plaintiff been able to establish "daily and continuous proximity" to the defendant's pipes which overlapped with the use of the asbestos piping, the plaintiff would have satisfied the "place" requirement for product nexus.[36] The plaintiff would not have needed to list "the specific time that those products were used."[37] Because the Plaintiff claimed to be in the "vicinity five times in five years" and failed to offer any evidence as to which pipe he handled, the Court granted summary judgment for the defendant.

Here, Plaintiff has satisfied the "place" requirement because Plaintiff has submitted affidavits that explicitly place Plaintiff in proximity to Sherwin-Williams products.[38] Mr. Hood affirms that he and Mr. Collins worked together on "many occasions on numerous projects" with paint products that included, among a host of others, Sherwin-Williams products during their nine months of working together in1994 at Rosing Paints.[39] Additionally, Mr. Hood claims that Plaintiff commonly used "alkyd paints" – the same type Mr. Hood claims to have been manufactured by Sherwin-Williams.[40] This case is factually distinguishable

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[35] *Id.*
[36] *Id*.
[37] *Id.* at *3. Because the plaintiff in *Lipscomb* claimed to be in the "vicinity five times in five years" and failed to offer any evidence as to which pipe he handled, the Court granted summary judgment for the defendant. *Lipscomb v. Champlain Cable Corp*., 1988 WL 102966, at *2-3 (Del. Super.); *Anderson v. Airco, Inc.*, 2004 WL 1551484, at *4 (Del. Super.),
[38] Hood Affidavit.
[39] *Id*.; "Bruce and I were able to 'taste' paint fumes on our breath, even long after having worked the products. . . it was not uncommon for [us to] get oil-based paint products, or occasionally mineral sprits or thinners, on our skin."
[40] *Id.*

from *Lipscomb* because, here, the Court has direct evidence in the form of the Hood Affidavit that places Plaintiff in physical proximity to Defendant's products. Therefore, the Court need not analyze circumstantial inferences to satisfy the "place" requirement.

The "time" element of the "time and place standard" necessary to establish product nexus refers to the frequency to which a plaintiff is exposed to a defendant's product. Measuring the accumulation of time a plaintiff needs to be in proximity to a product in order to overcome summary judgment is not a hard science and need not require specificity. As this Court noted:

> With regard to the frequency of use of asbestos cloth and tape, plaintiffs have affidavits from separate people maintaining that they used asbestos cloth and/or tape from 1953 to 1957. *There is no specific evidence as to how often those products were used-whether once a day, once a week, once a year*. Nevertheless, there is evidence from at least three people who will testify to having used these products over the critical 1954 to 1957 time span. It is this Court's opinion that this is a sufficient basis from which a reasonable jury could find that . . . [the plaintiff] was exposed to . . . [the defendant's] asbestos products. Summary judgment on product nexus is, therefore, denied as to [the defendant].[41]

This Court has discussed, at some length, whether the record supports an inference of a non-moving plaintiff's alleged minimum *proximity* to a product at issue, yet, in several instances, this Court is silent as to the *frequency* of exposures necessary

[41] *Conway v. A.C. & S., Co.*, 1987 WL 12448, at *4 (Del. Super.) (Taylor, J.). (emphasis added).

to overcome summary judgment.[42] On the other extreme, a plaintiff only having been exposed to a product "five times in five years" will not meet the "time" standard.[43]

Here, as in *Conway*, the record lacks specific evidence as to how often Plaintiff was exposed to Sherwin-Williams products. The Hood Affidavit speaks in broad terms – citing a nine-month span in which Plaintiff allegedly used Sherwin-Williams products on "many occasions." Unlike the plaintiff in *Lipscomb*, however, Plaintiff offers evidence as to which specific Sherwin-Williams products Mr. Collins was allegedly exposed. Furthermore, it can be inferred from the Hood Affidavit that Mr. Collins was exposed to Sherwin-Williams products far exceeding the "five times in five years."[44] Viewing the facts in the light most favorable to Plaintiff, the Court finds there are genuine issues of material fact which preclude summary judgment.

V. CONCLUSION

Plaintiff has met her burden in establishing that there are material issues of fact that make summary judgment inappropriate at this time. With the Hood Affidavit, Plaintiff satisfies the time and place standard for establishing product

[42] *See Nutt v. A.C. & S. Co.*, 517 A.2d 690, 692 - 93 (Del. Super. 1986) (Poppiti, J.) (holding that all that was necessary to establish product nexus was an inference of a plaintiff, Edward Perkin's, proximity, coupled with testimony that he "used" the product at issue, without any discussion of the extent of that use); *See also In re Asbestos Litig. (Nutt)*, 1986 WL 5871 (Del. Super. April 24, 1986) (Poppiti, J.).
[43] *Lipscomb*, *supra* note 31.
[44] *Id.*

nexus with Sherwin-Williams products. Therefore, Sherwin-Williams' Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

Jan R. Jurden, Judge

cc: Prothonotary - Original